MELVIN HELIT

IBLA 98-58 Decided December 2, 1998

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting location notices and declaring two association placer mining claims null and void. CAMC 260330-CAMC 260331.

Decision set aside; claims declared null and void.

1. Administrative Authority: Generally--Administrative Procedure: Adjudication--Rules of Practice: Generally

   As a general matter, when BLM has required the submission of a document and advised the party that failure to comply with its request will result in specific consequences and the party fails to comply with BLM's requirements, it is error for BLM to retroactively change the consequences for failing to comply, where such changes could fairly be seen as increasing the severity of the penalty for noncompliance. Rather, BLM should reissue its demand, and apprise the party of the increased consequences should he or she fail to comply.

2. Mining Claims: Location--Mining Claims: Placer Claims

   Where association placer mining claims are located which extend 9.28 miles and 12.72 miles in length, respectively, these locations are, on their face, not in conformity with the rectangular system of public land surveys, as required by 43 U.S.C. § 35 (1994), and the claims are properly declared null and void.

3. Mining Claims: Location--Mining Claims: Placer Claims

   Where it is impossible to determine the lands covered by a mineral location from either the description provided for the location or by recourse to the markings on the ground, with the result being that the situs of the lands claimed is indeterminate, the claim is properly declared null and void.

APPEARANCES: Melvin Helit, pro se; John R. Payne, Esq., Assistant Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; Paul R. Mohun, Esq., San Francisco, California, for Steven Nightingale; Cheryl J. Morse for Goodyear District Community Club.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Melvin Helit 1/ has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated July 14, 1997, rejecting recordation of location notices for the S ABLE #3-4-5-6-7-8-9-10 and the S ABLE #4-5-6-7-8-9-10-11 association placer mining claims (CAMC 260330-CAMC 260331) and declaring those claims null and void. For the reasons set forth below, although we set aside the decision of BLM, we also find that the claims are null and void.

The relevant facts leading up to this appeal are not in particular dispute. Notices of location for the two claims at issue were recorded with BLM on October 1, 1993. Each of the notices purportedly described claims encompassing 160 acres within the Tahoe National Forest which had been located on September 1, 1993. However, despite the fact that 30 U.S.C. § 35 (1994) expressly mandates that all claims located after May 10, 1872, "shall conform as near as practicable with the United States system of public-land surveys and the rectangular subdivisions of such surveys," the claim locators made no effort whatsoever to conform to the rectangular survey system. As an example, the location notice for the S ABLE #4-5-6-7-8-9-10-11 association placer claim, after noting that "[t]he locators do not claim interest in proven, valid Mining Claim that was prior," described the claim as a 200-foot wide claim:

> [S]tarting at the patented land at Goodyears Bar in Sec. 6E½ T19N R10E MDM thence South up Woodruff Creek in Sec. 5SW¼, Sec. 8W½, thence up Creek to Sec. 17 W½ where Claim ends at Sec. 17SW¼, and Sec. 20 NW¼ meet. Returning to North Yuba River (NYR) thence West Sec. 6 following NYR to Sec1E½ T19N R9E MDM, to Ramshorn Creek North up Creek to East center of Sec. 36 T20N R 9E MDM. Returning to NYR in Sec. 1S½ thence SW to Sec. 12NW¼ thence SW to St. Catherine Creek South up Creek to Creek to Sec. 14NE¼. Returning to NYR Sec. 11 thence West to Sec. 10S½ thence South to

1/ Melvin Helit appears both as one of the claimants and as "agent for Contestants," A Able Plumbing, Inc., Paul B. Helit, Rufina Helit, Adrian Helit, Stephen P. Helit, Michael S. Helit and Paula J. Helit. While there may be some question as to Melvin Helit's authority to represent his co-locators, we note that 43 C.F.R. § 1.3(b)(3)(i) expressly permits individuals to represent members of their family.

> Sec. 15 thence SW to Sec. 16E½ to Humbug Creek East up Creek to Sec. 15SW¼. Returning to NYR in Sec. 16 thence West to Sec. 17E½ where the claim ends at patented land. Claim goes around any patented land.

(Emphasis supplied.)

The record further discloses that on January 7, 1994, Helit filed a document entitled "Amended Placer Mining Claim Location Notice," ostensibly for the purpose of "more definitely describing the situation and boundaries of said placer." This amended notice averred that the S ABLE #4-5-6-7-8-9-10-11 claim was situated in:

> Sec. 5W½, Sec. 6ALL¼, Sec. 8W½. Sec. 17W½, T19N R10E MDM. Sec. 1All¼, Sec. 10S½, Sec. 11NE¼, SW¼, SE¼, Sec. 12N½, E½, Sec 14NE¼, Sec. 15 ALL¼, Sec. 16 ALL¼, Sec. 17E½ T19N R9E MDM. Sec. 36E½ T20N R9E MDM.

The amended notice further averred that "at all times claim goes around any Patented Land," though no explanation was provided as to what land this referred to or how this was to occur. A similar amended notice was filed for the S ABLE #3-4-5-6-7-8-9-10 association placer claim.

Not only did the new "descriptions" provided in the amended notices belie the stated intent of more definitely describing the boundaries of the claims, but both amended notices also stated that, with reference to the discovery monuments and description of the claims, "please see original location notice located September 1, 1993, and filed with BLM." Thus, the purpose, relevancy, and impact of these notices are difficult to ascertain. In any event, verbatim additional "amended notices" were filed on January 27, 1995, and February 27, 1997, for both association placer claims.

These two claims were not the only association placer claims these claimants had located. In point of fact, the Forest Service asserts that Helit filed location notices on behalf of the same group of locators for approximately 25 similarly described 160-acre association placer claims, all of which were purportedly located on September 1, 1993. 2/ Numerous other locations were subsequently filed by this group. See, e.g., Melvin Helit, 144 IBLA 230 (1998). The number of claims located by Helit and his co-locators and their expansive geographical extent 3/ elicited a close scrutiny by the Forest Service of the two claims involved herein.

2/ This figure is provided in the report prepared by Forest Service Geologist Jim Voss, dated Mar. 28, 1997 (Voss Report) at 48. See also Melvin Helit, 144 IBLA 230, 232 (1998).

3/ According to the Voss report, the S ABLE #3-4-5-6-7-8-9-10 extends along the North Yuba River and several of its tributaries for 9.28 miles, while the S ABLE #4-5-6-7-8-9-10-11 extends along the North Yuba River and its tributaries for 12.72 miles. See Voss Report at 1-2.

The Forest Service was particularly concerned because each of these claims embraced lands which had been withdrawn for a proposed expansion of the Goodyear's Bar Townsite. 4/

A report was prepared, dated March 28, 1997, by a Forest Service geologist, which highlighted a number of concerns, including questions relating to whether the claims had been properly monumented on the ground, whether they were properly located under what Helit referred to as the "gulch placer" exception, whether the claims contained noncontiguous parts, whether the claims contained excess acreage, and whether the locations had been made in good faith for mining purposes. See Voss Report dated March 28, 1997, from Minerals Management Team, Forest Service, to Associate State Director for Minerals, BLM.

In a notice dated May 22, 1997, BLM adverted to the Forest Service report and specifically requested that the claimants replot their claims in 10-acre tracts which conformed to the public land survey system, citing both the statute (30 U.S.C. § 36 (1994)) and applicable regulations (43 C.F.R. §§ 3833.1-2(b)(5)(i), 3842.1-2(b), and 3842.1-5(d)). In addition, BLM pointed out that, as described, each of the claims embraced far beyond the statutory maximum of 160 acres for any single association placer claim. Inasmuch as the S ABLE #3-4-5-6-7-8-9-10 embraced 200 feet of land extending along the North Yuba River and several of its tributaries for 9.28 miles, it contained a total of 225 acres, while the S ABLE #4-5-6-7-8-9-10-11, which extended along the North Yuba River and its tributaries for 12.72 miles, contained a total of 308 acres. Since both of these claims were greatly in excess of the 160-acre statutory maximum for association placer locations, BLM informed the claimants that excess acreage must be eliminated from the claims. Finally, BLM noted that, because certain patented lands totally bisected the land description of the claims, each claim included noncontiguous parcels within a single placer location, which would be a violation of the provisions of 30 U.S.C. § 36 (1994). BLM advised claimants that any amendment should make it clear that noncontiguous parcels were not included within a single location.

BLM provided claimants a period of 30 days in which to submit new descriptions which conformed to the public land survey system and included no more than the 160 acres per claim allowed by statute. BLM further advised them that "[f]ailure to comply with this Notice within the 30 days allowed and in the manner requested in this notice will result in the government initiating a contest action against the claims." (Notice of May 22, 1997, at 4.)

On June 24, 1997, Helit filed another set of amended location notices and maps. Contrary to the directions provided by BLM, however, these notices in no way altered the descriptions of the claims. Accompanying the submission was a cover letter from Helit in which he denied that

_____

4/ This withdrawal, however, occurred subsequent to the location of these two claims.

the locations were not in conformity with the law, arguing that the locations were sustainable as "gulch placers" and that, if the acreage of the patented lands were excluded, the claims would not exceed the statutory maximum.

In its July 14, 1997, decision under review, BLM concluded that the claimants had failed to comply with the May 22, 1997, notice. BLM recognized that the notice had warned claimants that a failure to comply would result in the initiation of a contest against the claims. BLM advised claimants, however, that "[t]he notice should have stated, 'failure to comply with this notice will result in the recordation of the claims being rejected' and is hereby amended accordingly." BLM thereupon rejected recordation of the mining claims and held the claims null and void for failure to file the instruments required by 43 C.F.R. § 3833.1-2(b)(5)(i) and (ii). (Decision at 2.) Claimants thereupon pursued the instant appeal. 5/

[1] There is one matter which must be dealt with initially and this involves the propriety of the procedures employed by BLM herein. As we recounted above, in its May 22 notice, BLM ordered claimants to redescribe the claims in conformity to the public land survey system, failing in which the Government would initiate a contest action against the claims. After Helit had failed to comply, however, BLM did not initiate contest proceedings; rather, it retroactively amended its May 22 notice to provide that a failure to comply would result in a declaration that the claims were rejected for recordation and then proceeded to do so. This was clearly improper.

This Board has, on numerous occasions, affirmed the authority of BLM officials, acting within the scope of their delegated responsibilities, to require the filing of information or the taking of other actions within a specified time-frame and to provide penalties for the failure to do so. See, e.g., Melvin Helit, supra; Carl Gerard, 70 IBLA 343 (1983). But a critical element in enforcing the penalties is that the party was informed of exactly what consequences might be expected if he or she failed to comply with the BLM request. One would, after all, expect that the likelihood of a favorable response would increase as the severity of penalties for a failure to respond rose. In view of this expectation, what cannot be permitted is the imposition of penalties upon a failure of compliance which are harsher than those threatened in the compliance notice. While the

---

5/ On Aug. 28, 1998, counsel for Steven Nightingale, who is an owner of a Forest Service special use homesite in the Goodyear's Bar Expansion Area, filed a request to expedite consideration of this appeal. A similar request to expedite was also filed on behalf of the Goodyear District Community Club, which is apparently similarly interested in the completion of the townsite expansion. BLM also joined in the request. We have, accordingly, expedited consideration of this appeal.

initiation of a mining contest could clearly be seen as an adverse action, it differs considerably in impact from a decision rejecting recordation of the claim and declaring the claim null and void. When BLM realized that it had erred in its May 22 notice in delineating the consequences of a failure to comply, it was required to reissue another notice if it intended to increase those consequences. It could not, in effect, retroactively increase the penalties attendant upon a failure of compliance.

[2] Therefore, if the only issue presented by this appeal were the failure of claimants to comply with BLM's order to conform the descriptions to the public land survey and eliminate excess acreage, we would be forced to set aside BLM's declaration that the claims were null and void 6/ and remand the matter to BLM to afford claimants another opportunity to comply with its Notice. However, as an examination of the case record and Helit's submissions makes clear, the locations of these claims are so indefinite that there was no need to afford claimants an opportunity to rectify the situation even in the first instance. These claims could have been declared null and void by BLM in its initial adjudication. Exercising our de novo review authority, we hereby declare the claims null and void for reasons provided below.

In his statement of reasons in support of his appeal (SOR), Helit argues that, if one eliminates the acreage within prior "valid mining claims" whose validity has been established, which he argues should be done because the location notices expressly provide that "the locators do not claim interest in proven, valid Mining Claim that was prior," the total acreage would be "much less than" 160 acres for each claim. (SOR at 3.) At the same time, however, Helit argues that a locator cannot be required to place his boundary lines over prior claims as a justification for the failure of the claims to conform to the rectangular system of survey. Helit also reiterates his contention that the shape of the claim is permissible because these claims are "gulch placer claims." Id.

_____

6/ Even without the problem of the lack of notice of the penalty upon noncompliance, we would be forced to set aside BLM's declaration rejecting the claims' recordation. While BLM premised its decision in part on the failure of appellants to comply with 43 C.F.R. § 3833.1-2(b)(i), it would appear that claimants had technically complied with the regulation's requirements, particularly with respect to the amended descriptions as set forth in the text. The regulation requires that the description provided must show "the approximate location of all or any part of the claim to within a 160 acre quadrant of the section (quarter section) or sections, if more than one is involved." In point of fact, the amended description did list the sections involved. For example, when the description for claim S ABLE #4-5-6-7-8-9-10-11 described the claim as embracing, inter alia, "Sec. 5W½, Sec. 6ALL¼, Sec. 8W½. Sec. 17W½, T19N R10E MDM," this could be read as embracing both the NW¼ and SW¼ sec. 5 and all four quadrants of sec. 6. The problems of excess acreage and noncontiguous parcels are problems of substance which go to the claims' validity and extent, however. They are not properly recordation problems.

None of these arguments withstands analysis and some are internally inconsistent. Thus, Helit argues that he can ignore the statutory mandate to locate placer claims "as near as practicable with the United States system of public land surveys," 30 U.S.C. § 35 (1994), because he cannot be required to extend the boundaries of his claim to embrace other mining claims. Yet, at the same time, he argues that he has not exceeded the 160-acre limitation because he has, in fact, included valid claims within his location whose acreage should not be counted against him.

Helit's assertion that because these claims are "gulch" placers they are exempted from the location requirements of 30 U.S.C. § 35 (1994) is wrong both factually and legally. Factually, these are not gulch placers. The pictures provided in the Voss Report clearly show that the claims do not consist of a narrow strip of land in the bed of a small stream "surrounded by precipitous and, in many cases, impassable canyon walls and cliffs." See United States v. Haskins, 59 IBLA 1, 97, 88 I.D. 925, 973 (1981), aff'd, Haskins v. Clark, No. CV-82-2112-CBM (C.D. Cal. Oct. 30, 1984). On the contrary, the areas adjacent to the North Yuba River are clearly heavily forested and are not precipitous cliffs.

As a legal matter, we note that the Department's decision in William F. Carr, 53 I.D. 431 (1931), on which Helit claims to rely, expressly noted that, in that case, the adjacent lands excluded from the mineral location contained "no mineral, agricultural, or timber value." Id. at 434. The nonexistence of mineral, agricultural, or timber values in the adjoining walls was a critical factor in allowing the mineral claimant not to conform his location to the public land survey system because the patenting of land in irregular strips would make disposal of the adjacent areas remaining in Federal ownership difficult if not impossible. Thus, the existence of any values in the adjacent areas would have resulted in the requirement that the mineral entry be made in conformity to the system of public land surveys. Helit has attempted to create precisely the type of "shoestring" claim consistently rejected both by the Department and the Federal courts. See generally Hanson v. Craig, 170 F. 62, 65 (9th Cir. 1909); Snow Flake Fraction Placer, 37 L.D. 250, 257 (1908).

While it is true that, as a general rule, claimants whose locations either fail to conform to the rectangular system of survey or contain excess acreage are afforded an opportunity to cure these defects prior to a declaration of invalidity (see, e.g., Fred B. Ortman, 52 L.D. 467, 471 (1928) (nonconformity to survey); Samuel P. Barr, Sr., 65 IBLA 167 (1982) (excess acreage)), this rule is not without exceptions. Thus, as we noted in Melvin Helit, supra, the right to adjust a claim to delete excess acreage is only available where the inclusion of excess acreage in the first instance was inadvertent. Cf. Waskey v. Hammer, 223 U.S. 85, 90 (1912); Zimmerman v. Funchion, 161 F. 859, 860 (9th Cir. 1908). Herein, as in the previous Helit case, it is clear that the inclusion of excess acreage was intentional.

Moreover, in both Wood Placer Mining Co., 32 L.D. 198 (1903), and Miller Placer Claim, 30 L.D. 225 (1900), the Department cancelled mineral entries because of a failure to conform to the system of public land surveys without affording the claimants an opportunity to amend their claims because the very extent of their nonconformity made it effectively impossible to fairly conform the claim. In Wood Placer Mining Co., supra, the Acting Secretary rejected two claims which were each 9,000 feet in length and approximately 500 feet in width, generally tracking the bed of Hughes creek, noting that "[t]he locations here in question (comprising a long and narrow strip, throughout its length following and embracing Hughes creek, in the manner shown on the official plat) do not even approach conformity with the system of public-land surveys." Id. at 200. The same could clearly be said of the instant claims, which variously run between 49,000 feet and 67,100 feet in length.

We hold that the nature of the locations in the instant case are so contrary to the statutory mandate of 30 U.S.C. § 35 (1994) that no opportunity need be provided to conform the locations to survey. They are properly declared null and void as a matter of law.

[3] Additionally, there is another fatal flaw in these two locations. The claimants have located claims which, on their face, exceed the acreage limitations. Helit has argued, however, that the claims do not actually include more than 160 acres because the location notices expressly abjured any interest in lands within prior valid claims, though he does not identify any such claim nor does he provide acreage estimates to bolster his conclusion. 7/ Indeed, given the "disclaimer" in the description provided by the location notices, it is difficult to see how anyone could ascertain what lands were or were not included in the location.

Any individual attempting to determine the scope of these two claims would be required to guess which claims Helit and his co-locators viewed to be valid and which he did not in order to determine the scope of the claim. Even if one could locate the outer boundaries of the description, there would simply be no way for a third party to determine, with any degree of certitude, which lands were claimed by Helit and which were not. Furthermore, since each location is described as 100 feet on each side from "center of river, creek, etc.," if the river altered its bed, the claim would presumably move with it.

In reality, Helit and his co-locators have attempted to locate a "floating claim," one which can vary, at any time, by their subjective

---

7/ Contrary to Helit's argument on appeal, the location notices did not eschew a claim to any prior valid mining claims. They excepted "proven" valid mining claims which were prior. Of course, this begs the question of "Proven to whom?" Obviously, claimants intended to retain the right to judge for themselves what was a "proven" claim and, thus, there could be no possible way for a third party to know what lands were or were not intended to be included in the claim.

declarations (as to what is or is not a "valid prior claim") or the vagaries of nature. Assuming the claims were ever marked on the ground, 8/ the floating of claims after their boundaries have been fixed on the ground has long been held violative of the entire system of mineral location and entry and such indefinite claims are properly declared a nullity. 9/ See Brown v. Levan, 46 Pac. 661, 662 (Id. 1896); American Law of Mining, 2d ed., § 33.09[3]. We declare these claims invalid for this reason as well.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside but the S ABLE #3-4-5-6-7-8-9-10 and the S ABLE #4-5-6-7-8-9-10-11 association placer mining claims (CAMC 260330-CAMC 260331) are declared null and void.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

8/ Despite the fact that the California statutes require the marking of each corner of the boundary of placer claims which do not conform to survey (see Division 3.5 of the Public Resources Code § 3902 (b) (1988)), we note that Voss was unable to find a single boundary marking on either of the claims. See Voss Report at 48. The failure to mark the boundaries of placer claims when required to by State law renders the claims invalid. See Roberts v. Morton, 549 F.2d 158, 161-62 (10th Cir. 1977), aff'g United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973). See also Zweifel v. Wyoming ex rel. Brimmer, 517 P.2d 493 (Wyo. 1974).

9/ While the "floating" of lode claims prior to marking the boundaries is, under some circumstances, permissible, we note that it has generally been assumed that the problems of "floating" claims cannot arise with respect to placer locations since, if the discovery is located on Government land, the claim must conform to the rectangular survey system, if possible. See American Law of Mining § 33.04[4], 2d ed. Helit and his co-locators, however, apparently found a way to "float" a placer claim, though not one, we hold, that is in accordance with the law.